SUPREME COURT, U. S.

JAN 18 1969

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 956

UNITED STATES OF AMERICA,

Respondent,

—against—

HOWARD WEISBLUM,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Howard Weisblum, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 20, 1968.

Opinion Below

The Per Curiam opinion of the Court of Appeals is not yet reported. It is reprinted herein (Appendix *infra*, p. 11).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit (Appendix *infra*, p. 13) was entered on December 20, 1968. The order denying petitioner's request for a rehearing was filed on January 10, 1969. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether defendant's request, made prior to sentence, and made in support of his motion for leave to withdraw his plea of guilty, that he be afforded the opportunity (the next day) to produce a psychiatrist, Doctor Lawrence I. Kaplan, to testify to defendant's mental condition, should have been granted.

2. Whether the District Court's refusal to grant such relief, and the denial of defendant's motion to withdraw his guilty plea constituted a deprivation of defendant's "day in court" and was error.

Statute Involved

Rule 32, Subdivision (d), 18 U. S. C. A. of the Rules of Criminal Procedure for the United States District Courts provides as follows:

> Rule 32. Sentence and Judgment
>
> (d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice

the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Statement of the Case

Defendant was tried before Judge Weinstein on the second count of an indictment charging that he was a party to the making of a false statement to his draft board (the first count of "draft evasion" had been dismissed). He was found guilty, but the court set the verdict aside, and ordered a new trial because of inflammatory statements by the Assistant U. S. Attorney.

On May 2, 1968 the case was called before Honorable Walter Bruchhausen, at which time a plea of guilty was entered. Thereafter on June 13, 1968 defendant appeared before Honorable Joseph Zavatt. On that day and prior to the imposition of sentence defendant moved to withdraw his plea of guilty, and asked for an adjournment of one day (the case was on the calendar for the very first time) to enable him to produce a psychiatrist, Dr. Lawrence Kaplan. The court was told that Dr. Kaplan was prepared to testify that on May 2, 1968 (the date of the plea of guilty) the defendant was in fact mentally incapable of entering such a plea.

The defendant had earlier volunteered for the Army, and the Air Force, but had been rejected by both on the ground of mental incapacity. His draft board, on May 25, 1964 similarly rejected him stating "Trainability limited".

Between the date of the order for the new trial and the date of his guilty plea, the defendant had cooperated with the government and had in fact testified in the government's

behalf in another prosecution. He tried to tell the court what the Assistant U. S. Attorney had promised him, but was cut short. The Assistant U. S. Attorney, however, conceded that certain promises were made. Nevertheless Judge Zavatt refused to grant any adjournment, denied every motion, and summarily incarcerated the defendant. In due course the Court of Appeals overruled, and released the defendant pending appeal.

Reasons for Granting the Writ

POINT I

The refusal of the Court to give the defendant an opportunity to produce expert opinion evidence of defendant's mental condition and the refusal of the Court to permit the defendant to withdraw his guilty plea was an abuse of discretion warranting a reversal.

The statutory authority granting the Trial Court the power to permit a defendant to withdraw a prior guilty plea is contained in Rule 32, Subdivision (d), 18 U. S. C. A. of the Rules of Criminal Procedure for the United States District Courts, and has been in effect since the effective date of the Rules, namely, March 21, 1946. The action of the trial court in a matter involving this power is subject to review in order that the appellate court may determine whether there has been an abuse of discretion or, more accurately, whether the trial court has exercised a judicial discretion or has acted arbitrarily.

Generally, it may be said that the withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting a withdrawal of the guilty plea. See 14 Am. Jur., Section 287, Page 961. Another test is the

rule whether the withdrawal of the plea is dictated by demands of manifest justice.

Kercheval v. *U. S.*, 274 U. S. 220, has been cited by the Circuit Courts. In this decision the Supreme Court set forth the law and said:

> "The Court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for *any* (italics by court) reason the granting of the privilege seems fair and just."

It is submitted that the court below overlooked or misapprehended this decision for, under this holding by the Supreme Court, the conclusion is inescapable that the defendant advanced sufficient reason for a hearing on his contention of mental incapacity; and that the denial of *any* hearing by the District Court was arbitrary and capricious.

In *William L. Poole, Appellant* v. *United States of America, Appellee,* 102 U. S. App. D. C. 71, 250 F. 2d 396, the Court of Appeals reversed the order of the District Court denying defendant's application to withdraw his guilty plea with directions to vacate the judgment of conviction and hold a new trial. In reversing, the Court stated on Page 400:

> "The trial court erred when it denied appellant's request to withdraw his plea of guilty. Leave to withdraw a guilty plea prior to sentencing should be freely allowed. As we said in McJordan against Huff (1943) 77 US App. D. C. 171, 172, 133 F 2d 408, 409, '* * * it goes without saying that a plea of guilty at that time (arraignment) can be and often is changed

> on proper motion *as a matter of course'* " (italics by court) and cited *Kercheval* v. *U. S., supra.*

Again, in the *Poole* case, *supra,* at Page 400, the Court made the following observation, a fact identical to the situation in the case at bar:

> "Moreover, in this case, before sentence was imposed, appointed counsel indicated—at least in a general fashion—that there might be a question of the accused's mental capacity."

The right of a defendant for an opportunity to present evidence at a hearing in support of his application for leave to withdraw his plea is supported by the decision of the United States Court of Appeals for the Seventh Circuit in the case of *U. S.* v. *Davis,* 212 F. 2d 264 (C. A. 7). In reviewing the case, the Court reached the conclusion that where the record did not "conclusively show" that the defendant had the necessary understanding of the charge to which he pleaded guilty, defendant was entitled to a hearing on his motion and to an opportunity to be present and to present evidence, if any, to support allegations of his motion. At the conclusion of such a hearing the District Court would be required to make findings of fact, and state its conclusions of law. The order was reversed and the cause remanded.

This issue was before the Court of Appeals in *U. S.* v. *Mainer,* 383 Fed. 2d 444 (C. A. 3) decided September 7, 1967. There, the defendant sought to withdraw his guilty plea, asserting that he had been promised a lesser sentence. The court allowed the defendant to make an unsworn oral statement as to his grounds and denied leave

to withdraw the plea. The Court of Appeals held that this was not the "legal hearing" to which defendant was entitled. Here too, as in the cases cited above, the Court of Appeals vacated the order denying the application to withdraw the guilty plea, and permitted the defendant to withdraw his plea.

The Court's sentence of the defendant in the case at bar under Section 4208B of the Criminal Code for study and report is hardly in conformity with the defendant's right to withdraw his plea of guilty. The refusal of the Trial Court to grant a twenty-four hour adjournment (see Minutes of Proceedings taken at the time of sentence, Page 12, Lines 14 to 25), to enable the defendant to produce expert opinion evidence corroborating the defendant's inability to enter a guilty plea, is typical of the arbitrary attitude on the part of the Court and further supports the defendant's contention that the determination constituted an abuse of discretion.

POINT II

The defendant is entitled to every legal safeguard.

It is respectfully submitted that the Appellate Court below committed error when it made reference in its opinion to "a variety of grounds". The question of good faith as to other grounds urged for adjournment is irrelevant. The only issue here is "was defendant incompetent to plead guilty"—and on this, there was *no hearing;* the defendant was forced to convict himself, contrary to all legal and constitutional principles.

POINT III

The defendant has had no hearing whatsoever. He has not had his day in court.

In order to protect a defendant who has indicated his intention of changing his plea from *not guilty* to *guilty,* a detailed formula, consisting of a series of questions and answers has been devised, and careful interrogation is made, before the change will be accepted. *A fortiori,* a similar procedure must take place and be in effect, in order to safeguard the defendant who wishes to change his plea from *guilty* to *not guilty*—all the more so, where the ground upon which he bases his request is *lack of mental capacity.* He must be given his day in court under recognized legal and constitutional principles. In the instant case, if any proceeding took place it was perfunctory, to say the least; and no opportunity was afforded the defendant for *any* hearing (the court went so far as to decline to appoint its own psychiatrist) (Appendix 18a)—not even an adjournment of *one* day. In effect the defendant by changing his plea (even though he did not have mental capacity), has convicted himself of crime without an opportunity of presenting his case, without any hearing, and without having had his day in court.

Cf. *Kercheval* v. *U. S.*, 274 U. S. 220 at page 223:

> "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. * * * Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily

after proper advice and with full understanding of the consequences."

And at page 224:

"But on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear, or inadvertence."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SAMUEL NIRENSTEIN
of Counsel

Opinion of the United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 246—September Term, 1968.

(Argued December 18, 1968 Decided December 20, 1968.)

Docket No. 32819

UNITED STATES OF AMERICA,

Appellee,

—against—

HOWARD WEISBLUM,

Appellant.

Before:

KAUFMAN and ANDERSON, *Circuit Judges,*
and MCLEAN, *District Judge.**

Appeal from an order of the United States District Court for the Eastern District of New York (Zavatt, *D.J.*) denying defendant's motion to withdraw his plea of guilty. Affirmed.

* Of the Southern District of New York, sitting by designation.

SAMUEL NIRENSTEIN, New York, N. Y., *for Appellant.*

JOSEPH P. HOEY, United States Attorney, Eastern District of New York, Thomas J. O'Brien, Assistant United States Attorney, of Counsel, *for Appellee.*

PER CURIAM:

This defendant-appellant pleaded guilty on May 2, 1968. When he came up for sentence on June 1? 1968, his attorney first asked that sentence be deferred in order to afford defendant an opportunity to submit a psychiatrist's report as an aid to the court in imposing sentence. The court declined to postpone sentencing for that purpose and stated that it would commit defendant under 18 U. S. C. §4208(b) for study and report. Defendant then requested an adjournment on a variety of other grounds. The court considered each of these grounds insufficient and denied any postponement. Only then did defendant state that he wished to withdraw his plea of guilty, at which point his attorney requested a one-day adjournment in order to produce medical testimony as to defendant's lack of mental capacity at the time when he pleaded guilty. The court obviously believed this belated claim to be merely an afterthought which required no further consideration. Under all the circumstances, including the prior history of this case, we cannot say on this record that the court abused its discretion in denying defendant's motion to withdraw his plea.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of December one thousand nine hundred and sixty-eight.

Present:

HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges,
HON. EDWARD C. McLEAN,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HOWARD WEISBLUM,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 956

HOWARD WEISBLUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1968. A petition for rehearing was denied on January 10, 1969. The petition for a writ of certiorari was filed on January 18, 1969, invoking

the jurisdiction of this Court under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion to withdraw his guilty plea.

STATEMENT

On March 28, 1966, a federal grand jury in the United States District Court for the Eastern District of New York returned an indictment charging petitioner with draft evasion and with causing the submission of false and fraudulent statements to his local draft board, in violation of 50 U.S.C. App. 462(a). In February 1968, petitioner was tried by a jury before Judge Weinstein. During the trial, Count I of the indictment was dismissed; but the jury returned a guilty verdict on Count II, which charged that petitioner was falsely represented as being a member of the Armed Forces Reserves. At the trial petitioner admitted that he agreed to pay a co-conspirator $3500 to keep him from going into the service.

On April 1, 1968, Judge Weinstein granted petitioner's motion to set aside the verdict on the ground that the government's summation to the jury was prejudicial.

The case was scheduled for retrial on April 18, 1968. At that time, however, petitioner was granted a substitution of attorneys, and a request for an adjournment by new counsel was granted.

On May 2, 1968, the case was called before Judge Bruchhausen. At that time petitioner changed his plea from not guilty to guilty. Before accepting the plea of guilty Judge Bruchhausen conducted a searching inquiry and determined that petitioner was aware of his rights and understood the nature of the charge, and that no threats or promises had been made to induce him to plead guilty (see the minutes of plea hearing).

On June 13, 1968, petitioner appeared before Judge Zavatt for sentencing. He requested that sentencing be adjourned, initially on the ground that he was being examined by a private psychiatrist who needed additional time to complete his report and that this report might be of value to the court in fixing a sentence. Judge Zavatt noted that nothing in the probation report indicated that there was anything wrong with petitioner, but since the issue had been raised, he stated that he would commit petitioner under 18 U.S.C. 4208(b) for examination and report before imposing a definite sentence (R. 2).[1] Counsel then unsuccessfully suggested that sentencing be postponed until that afternoon (R. 6). At that point, petitioner personally objected that one of the prosecuting attorneys had assured him that his sentencing would be delayed (R. 6). It was then developed that the prosecutor had indicated that he would have no objection if the matter of sentencing were not to come up until the summer, because petitioner suggested that his father,

[1] Record references are to the minutes of the sentencing hearing.

who suffered from a heart condition, would be adversely affected if petitioner could not attend his brother's wedding on June 20, 1968 (R. 6-11). In denying the application on these grounds the court stated (R. 9):

> You know, you are changing the story. A moment ago you were talking about his psychiatric problems, then promises were made by the United States Attorney, I called him down. Now we hear something about a wedding of a brother.

Only after these applications had been denied did petitioner, himself, move to withdraw his plea of guilty, objecting: "then, Your Honor, I wish to change my plea * * *" (R. 11). Deeming the grounds insufficient, the court denied the request. Petitioner's counsel then offered a "different ground" for withdrawing the guilty plea, explaining that during the noon recess, he had consulted petitioner's private psychiatrist and that the psychiatrist had reached a tentative opinion that petitioner may not have been mentally competent at the time of his plea of guilty on May 2, 1968 (R. 11-13). The court denied the motion to withdraw the plea of guilty and committed petitioner under 18 U.S.C. 4208(b) for a "thorough psychiatric and psychological report" before imposing a definite sentence (R. 13).

ARGUMENT

In the circumstances of this case, the trial court did not abuse its discretion in denying the motion to withdraw the plea of guilty, made after the defendant had unsuccessfully endeavored on several grounds to have his sentence postponed and only then sought to with-

draw the plea. The plea of guilty in this case had obviously been knowingly entered after due deliberation. Petitioner had been through one trial. He had, as the petition states (Pet. 3-4), testified for the government in another case with respect to the scheme to have it appear that petitioner was a member of the reserves. The plea was entered after petitioner's new counsel had been given an adjournment to prepare for trial. It was not accepted until the judge had made a thorough inquiry as required by Rule 11, F.R.Crim.P. In none of these proceedings was there any suggestion that petitioner was not competent to consult with counsel or to understand the proceedings. The court below was on firm ground in upholding the district court's treatment of "this belated claim" as "merely an afterthought which required no further consideration" (Pet. App. 12).

A defendant has no absolute right to withdraw a guilty plea, even before sentence. *United States* v. *Giuliano*, 348 F. 2d 217 (C.A. 2), certiorari denied, *sub nom. Prezioso* v. *United States*, 382 U.S. 939; *Zaffarano* v. *United States*, 330 F. 2d 114 (C.A. 9), certiorari denied, 379 U.S. 825. Here, however, petitioner did not move to withdraw his plea of guilty until after his attempts to have sentencing postponed on various grounds had failed *and* the court had indicated that it would commit petitioner for study and report under 18 U.S.C. 4208(b). Thus, under the circumstances, the motion to withdraw the plea was essentially in the posture of a motion after, rather than before, sentence. Under Rule 32(d), F.R.Crim.P., a post-sentence motion to withdraw a guilty plea may

be granted only "to correct manifest injustice." This record presents no hint of injustice, and accordingly the district judge acted within his discretion in refusing to permit the plea to be withdrawn.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1969.

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